

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSH 2006-2
)	
DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,)	ORDER NO. 189
)	
Complainant,)	ORDER GRANTING DIRECTOR,
)	DEPARTMENT OF LABOR'S
vs.)	MOTION TO DISMISS APPEAL,
)	FILED ON MARCH 3, 2006
STEVEN AND PAMELA VREEKEN,)	
)	
Respondents.)	
)	

ORDER GRANTING DIRECTOR OF LABOR'S
MOTION TO DISMISS APPEAL, FILED ON MARCH 3, 2006

Respondents STEVEN and PAMELA VREEKEN contest a Citation and Notification of Penalty issued by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR) on August 12, 2005. On March 3, 2006, the DIRECTOR, by and through his counsel, filed a motion to dismiss the appeal on the grounds that Respondents failed to file a timely notice of contest and failed to file an "original" petition.

On March 15, 2006, the Board conducted an initial conference in this matter where the DIRECTOR was represented by counsel and Respondent STEVEN VREEKEN appeared, pro se. Based on the representations of the parties, the Board issued a Pretrial Order, Order No. 184, on March 16, 2006. The Board stated:

2. Respondents shall file an initial conference statement identifying their witnesses with the Board by the close of business on March 22, 2006. In addition, Respondents shall file any memorandum in response to the Director of Labor's Motion to Dismiss Appeal, filed on March 3, 2006 with the Board by the close of business on March 22, 2006.
3. The Board will conduct a hearing on the Director of Labor's Motion to Dismiss Appeal, filed on March 3, 2006 on March 29, 2006 at 10:00 a.m. in the Board's

hearing room, Room 434, 830 Punchbowl Street,
Honolulu, Hawaii.

Respondents did not file an initial conference statement or a memorandum in response to the Director of Labor's Motion to Dismiss Appeal. On March 29, 2006, the Board conducted a hearing on the instant motion. The DIRECTOR was represented by counsel and Respondent STEVEN VREEKEN appeared, pro se on behalf of Respondents. Based upon the evidence and arguments presented, the Board indicated that it was inclined to grant the DIRECTOR's motion and requested the DIRECTOR to submit Proposed Findings of Fact and Conclusions of Law to the Board. Thereafter, on March 29, 2006, the DIRECTOR filed its Proposed Findings of Fact and Conclusions of Law of the Director with the Board.¹

Based upon a review of the Proposed Findings of Fact and Conclusions of Law and the record in this case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On or about May 23, 2005, a work accident occurred at Respondents' workplace located at 54-016 Kahikole Place, Hauula, Hawaii 96717. The accident was reported to the Division of Occupational Safety and Health (HIOSH), Department of Labor and Industrial Relations which conducted a comprehensive safety and health inspection on May 24, 2005.
2. As a result of the inspection, the DIRECTOR issued a Citation and Notification of Penalty (Citation) against the Respondents on August 12, 2005 alleging serious violations of occupational safety and health standards and assessing Respondents \$3,000.
3. The Citation was issued by certified mail, with a return receipt, to the Respondents' mailing address of P.O. Box 658, Hauula, Hawaii 96717. Respondent STEVEN VREEKEN received the Citation on August 31, 2005.
4. The Citation states, in part:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties, unless within 20 calendar days from your receipt of this Citation and Notification of Penalty, you mail a notice of contest to the State of Hawaii Occupational

¹The Board adopts the DIRECTOR's Proposed Findings of Fact 1-5 and Proposed Conclusions of Law 1-6, and incorporates them herein.

Safety and Health Division (HIOSH) at the address shown above. ...

* * *

Employers' Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the HLRB.

5. On September 27, 2005, Respondents e-mailed a letter to Caroleen M. Tabata (Ms. Tabata), Secretary to the Deputy Director of Labor and Industrial Relations, to contest the citation.
6. Respondent STEVEN VREEKEN admitted an original contest was not sent because he knew he was already past the deadline and sending one in the mail would have taken additional days. Transcript of hearing held on 3/29/06, pp. 7, 10.
7. Respondents failed to file an original notice of contest within 20 days after receipt of the Citation.

CONCLUSIONS OF LAW

1. A party desiring to appeal shall file a notice of appeal with the Director within 20 days after issuance of the Citation or proposed penalty. The word "shall" is generally regarded as mandatory and the statutory time for perfecting appeals is generally mandatory. Kissell v. Labor and Industrial Relations Appeals Board, 57 Haw.37, 549 P.2d 470 (1976), and In re Fasi, 63 Haw. 624, 634 P.2d 98 (1981). See also, Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986) (The failure of an appellant to file a timely notice of appeal in a civil matter is a jurisdictional defect that can neither be waived by the parties nor disregarded by the appellate court in the exercise of judicial discretion).

2. Hawaii Revised Statutes (HRS) § 396-11 states in pertinent part:

(a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

3. HIOSH promulgated Hawaii Administrative Rules § 12-51-19, which pertains to Employer contests of citation, proposed penalty or both, and implements HRS § 396-11. That section states in part:

Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the dates stamped on the contest by the director.

4. Respondents' e-mail was sent to Ms. Tabata 27 days after receipt of the Citation. Thus, Respondents failed to file their notice of contest within 20 calendar days from the receipt of the Citation on August 31, 2005 as required by the applicable statute and rules. The Board concludes that Respondents' contest is untimely and that it lacks jurisdiction over the instant contest.
5. The foregoing rule further requires that an employer serve an original petition on the Director, either by mail or delivery, postmarked or stamped within twenty calendar days of receipt of the citation.² In the instant case,

²In Decision No. 8, Case No. OSH 2003-3, Director, Department of Labor and Industrial Relations v. Si-Nor, Inc., the Board asserted jurisdiction over a contest where the employer faxed a notice of contest to HIOSH. When HIOSH advised that an original petition had to be filed, the employer mailed a notice of contest which was never timely received by the Director. The Board nevertheless heard the contest and affirmed the Citation. The Director appealed the Board's decision to the Circuit Court contending that the Board lacked jurisdiction over the contest because an original notice of contest was not filed with the Director as required by the applicable rules. In Civil

Respondents sent an e-mail on September 27, 2005 to Ms. Tabata to contest the Citation. The Board concludes that Respondents failed to serve an original petition on the Director either by mail or delivery within the applicable timelines in accordance with the foregoing rule.

ORDER

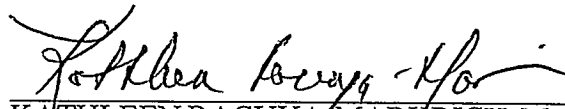
The Board hereby dismisses the instant contest for lack of jurisdiction because it was submitted beyond the 20 calendar day statutory contest period and because Respondents failed to submit an "original" petition to the DIRECTOR.

DATED: Honolulu, Hawaii, April 10, 2006.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member


KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General
Steven Vreeken

No. 04-1-1844-10, the Court reversed the Board's decision deferring to HIOSH's interpretation of its promulgated rules and held that the Board lacked jurisdiction over the contest because the employer failed to timely file an original notice of contest with the Director. The employer appealed the case to the Supreme Court in S.Ct. No. 27304 which is presently pending.